(2)

Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

No. 04-542

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *ET AL.*,

Petitioners,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

WILLIAM L. KEANE
Counsel of Record
SCOTT G. WASSERMAN
LESLIE HAMNER
M. SCOTT MCKENNA
R. RENE YECKLEY
LEGISLATIVE COUNSEL BUREAU
NEVADA STATE LEGISLATURE
401 S. Carson Street
Carson City, NV 89701
(775) 684-6830

Counsel for Respondents The Legislature of the State of Nevada, The Senate of the State of Nevada, Hon. Lorraine T. Hunt, The Assembly of the State of Nevada, Hon. Richard D. Perkins, Jacqueline Sneddon, Diane Keetch, Brenda Erdoes, and Claire J. Clift

QUESTIONS PRESENTED

1. Whether this Court should exercise jurisdiction over a case in which all Petitioners lack standing.
2. Whether this Court should exercise jurisdiction over a case in which not only do all Petitioners lack standing, but many Petitioners also are subject to the *Rooker-Feldman* doctrine for having previously litigated and unsuccessfully appealed to this Court the Nevada Supreme Court's decisions at the core of the instant case.
3. Whether this Court should exercise jurisdiction over a case in which all claims for relief are either moot or not viable based upon Respondents' immunity.
4. Whether this Court should exercise jurisdiction over a case to review an unpublished decision which does not create any split of authority.
5. Whether this Court should exercise jurisdiction over a case in which the Federal District Court and the Court of Appeals reached the right result, the result is based upon the Nevada Supreme Court's interpretation of the Nevada Constitution and, further, the result is supported by alternative independent grounds.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION 5
I. All Petitioners lack standing 6
A. Petitioners may be categorized as Legislator Petitioners, Voter Petitioners and Taxpayer Petitioners 7
B. Legislator Petitioners lack standing 7
C. Voter Petitioners lack standing 11
D. Taxpayer Petitioners lack standing 14
II. The *Rooker-Feldman* doctrine applies to Legislator Petitioners, but is not necessary to this case 14
III. Petitioners' claims for declaratory and injunctive relief are moot 15
A. Petitioners' claims for declaratory relief are moot 15
B. Petitioners' claims for injunctive relief are moot 16
C. The exception to mootness for "voluntary cessation" does not apply 17
D. The exception to mootness for "capable of repetition yet evading review" does not apply 20
IV. The Ninth Circuit's decision below does not create any split of authority 21

A. There is no conflict with the Seventh Circuit regarding the mootness of claims for declaratory relief 22

B. There is no conflict with the First Circuit regarding the mootness exception for "capable of repetition yet evading review." 22

C. There is no conflict with the cases cited by Petitioners regarding the standing of Legislators to bring institutional injury claims 23

D. There is no conflict with the First, Fifth, Eighth and D.C. Circuits regarding standing for individual voters to bring vote dilution claims 25

E. There is no conflict with the D.C. Circuit's *current* jurisprudence regarding standing 26

V. To alter the result in this case, this Court would need to revisit and overturn the Nevada Supreme Court's interpretation of its own state constitution 26

VI. Alternative independent grounds — specifically, immunity — support the result in this case 28

VII. On the merits, Petitioners bring only slightly altered versions of the same claims which this Court has already declined to hear in *Guinn* and which still do not merit review 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alabama v. Pugh,
438 U.S. 781 (1978) 28

Angle v. Guinn,
124 S. Ct. 1662 (March 22, 2004) 1, 3, 27, 30

Arizona v. Evans,
514 U.S. 1 (1995) 27

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 13, 15, 28

Ashcroft v. Mattis,
431 U.S. 171 (1977) 16, 22

Becker v. Federal Election Comm'n,
230 F.3d 381 (1st Cir. 2000) 22, 23

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 24

Campbell v. Clinton,
203 F.3d 19 (D.C. Cir. 2000) 8, 26

Chenoweth v. Clinton,
181 F.3d 112 (D.C. Cir. 1999) 8, 26

City News and Novelty, Inc. v. City of Waukesha,
531 U.S. 278 (2001) 17

City of Erie v. PAP'S A.M.,
529 U.S. 277 (2000) 17

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 14

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 17

Coalition for Sensible and Humane Solutions v. Wamser, 771 F.2d 395 (8th Cir. 1985) 25

Coleman v. Miller,
307 U.S. 433 (1939) ..... *passim*

Conway v. Searles,
954 F. Supp. 756 (D. Vt. 1997) 24

Creel v. Freeman,
531 F.2d 286 (5th Cir. 1976) 25

Crue v. Aiken,
370 F.3d 668 (7th Cir. 2004) 22

Daughtrey v. Carter,
584 F.2d 1050 (D.C. Cir. 1978) 25

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 14

Dyer v. Blair,
390 F. Supp. 1287 (N.D. Ill. 1974) 10

Exxon Corp. v. Wisconsin Dep't of Revenue,
447 U.S. 207 (1980) 27

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
364 F.3d 102 (3rd Cir. 2004) 15

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167 (2000) 17

Gomez v. Toledo,
446 U.S. 635 (1980) 29

Guinn v. Legislature of State of Nevada,
71 P.3d 1269 (Nev. 2003) ..... *passim*

Guinn v. Legislature of State of Nevada,
76 P.3d 22 (Nev. 2003) ..... *passim*

Gutierrez v. Pangelinan,
276 F.3d 539 (9th Cir. 2002) 8, 23

Johnson v. Fankell,
520 U.S. 911 (1997) 28

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 9, 15

Locklear v. North Carolina State Bd. of Elections, 514 F.2d 1152 (4th Cir. 1975) 25

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 6, 7

Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) 12, 26

Miller v. Johnson, 515 U.S. 900 (1995) 25

Morales v. Vega, 483 F. Supp. 1057 (D.P.R. 1979) 29

Murphy v. Hunt, 455 U.S. 478 (1982) 15, 21

National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803 (2003) 10, 14

Nesmith v. Sheldon, 48 U.S. 812 (1849) 28

North Carolina v. Butler, 441 U.S. 369 (1979) 27

O'Connor v. Donaldson, 422 U.S. 563 (1975) 29

Perry v. Del Rio, 66 S.W.3d 239 (Tex. 2001) 11

Preiser v. Newkirk, 422 U.S. 395 (1975) 15, 17

Procunier v. Navarette, 434 U.S. 555 (1978) 29

Raines v. Byrd, 521 U.S. 811 (1997) ..... *passim*

Rea v. Matteucci, 121 F.3d 483 (9th Cir. 1997) 24

Rhodes v. Robinson, 380 F.3d 1123 (9th Cir. 2004) 22

Richardson v. Town of Eastover,
922 F.2d 1152 (4th Cir. 1991) 24

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 14

Skaggs v. Carle,
110 F.3d 831 (D.C. Cir. 1997) 25, 26

Spencer v. Kemna,
523 U.S. 1 (1998) 21

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 9

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 14

Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) 29

Tenney v. Brandhove,
341 U.S. 367 (1951) 29

United States v. AVX Corp.,
962 F.2d 108 (1st Cir. 1992) 25

United States v. Concentrated Phosphate Export Ass'n,
393 U.S. 199 (1968) 17, 18

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 15

United States v. Richardson,
418 U.S. 166 (1974) 14

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) 17

Vote Choice, Inc. v. DiStefano,
4 F.3d 26 (1st Cir. 1993) 25

Weinstein v. Bradford,
423 U.S. 147 (1975) 21

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 28

Williams v. Eggleston,
170 U.S. 304 (1898) 28

Wolff v. McDonnell,
418 U.S. 539 (1974) 16, 22

Wood v. Strickland,
420 U.S. 308 (1975) 29

Constitutional Provisions

U.S. Const. amend. XI 28, 29

U.S. Cont. art. IV, § 4 (Guarantee Clause) 30

Nev. Const. art. 19, § 2 13

Statutes

42 U.S.C. § 1983 (2003) 28

Nev. Rev. Stat. 41.031 (2003) 28

Legislative Measures

Senate Bill 5 4

Senate Bill 6 ..... *passim*

Senate Bill 8 ..... 3, 5

Other Authorities

Assembly Daily Journal, Twentieth Special Session 2003, The Twenty-Fifth Day, July 19, 2003 4

Cox, Don, *Candidates come to dinner: Hopefuls discuss issues at tables of local residents,* Reno Gazette-Journal, October 27, 2004 20

Economic Forum, State of Nevada, Forecast of Future State Revenues, December 1, 2004 19

Neff, Erin, *'$1 million race' begins in earnest*, Las Vegas Review-Journal, April 28, 2004 20

Ryan, Cy, *Rainy day fund gets boost from economy*, Las Vegas Sun, December 7, 2004 19

Thevenot, Carri Geer, *SUPREME COURT: Challenger holds lead on justice: Poll shows Guinn appointee slightly trailing Las Vegas attorney*, Las Vegas Review-Journal, October 22, 2004 20

STATEMENT OF THE CASE

At its core, the instant case is an attempt to relitigate in federal court the Nevada Supreme Court's decisions in another case — *Guinn v. Legislature of the State of Nevada* — a case to which many of the Petitioners in the instant case were parties, and regarding which they exhausted all available challenges and appeals without success. *Guinn v. Legislature,* 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub. nom., Angle v. Guinn*, 124 S. Ct. 1662 (March 22, 2004). In *Guinn I*, the Nevada Supreme Court issued an order and writ of mandamus ("*Guinn* Order") directing the Nevada Legislature to enact revenue-raising bills upon simple majority votes rather than two-thirds votes during a specified and limited period of time. Pet. App. 3a, 9a; *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 24. Respondents[1] proceeded to obey the *Guinn* Order as the *Guinn* Order required them to do. Petitioners then brought the instant action against Respondents based upon Respondents' actions in preparation for enacting legislation pursuant to the *Guinn* Order as well as Respondents' alleged intent to actually enact legislation pursuant to the *Guinn* Order. Pet. App. 9a. Petitioners have maintained this case through the Ninth Circuit Court of Appeals ("Ninth Circuit") and to this Court despite the fact that the *Guinn* Order was litigated and appealed to the fullest extent possible in the *Guinn* litigation and, pursuant to that litigation, the *Guinn* Order was never found by any court to be invalid or incorrect in any way. *Angle*, 124 S. Ct. at 1662-63; *Guinn II*, 76 P.3d at 33. Petitioners also have maintained this case despite the fact that, soon after the decision of the United States District Court for the District of Nevada ("District Court"), the *Guinn*

---

[1] For the purposes of the instant brief, "Respondents" includes only those Respondents on whose behalf this brief is filed, specifically, the Nevada Legislature and the other Respondents who are entities, officers or employees of the Nevada Legislature.

Order expired without any legislation actually being enacted by simple majority votes. Pet. App. 3a; *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). These facts are explained below.

In June of 2003, Nevada Governor Kenny Guinn ("Governor Guinn") called the Nevada Legislature to its 20th Special Session, the primary purpose of which was to enact a bill to increase taxes so that the budget of the State would be fully funded as required by the Nevada Constitution. *Guinn I*, 71 P.3d at 1273. On July 1, 2003, as the Nevada Legislature's 20th Special Session continued, Governor Guinn commenced the *Guinn* case by requesting, in part, that the Nevada Supreme Court issue a writ of mandamus ordering the Nevada Legislature to raise revenue for education by a date certain. Pet. App. 8a; *Guinn I*, 71 P.3d at 1272. The Nevada Legislature responded with a brief arguing both *against* the issuance of the writ and *in favor of* interpreting the legislative voting requirements in the Nevada Constitution to require two-thirds votes to enact revenue-raising bills. *Guinn II*, 76 P.3d at 28. However, neither of these arguments of the Nevada Legislature prevailed. On July 10, 2003, based upon the facts and circumstances present during the 20th Special Session, the Nevada Supreme Court issued its *Guinn I* opinion and order, which interpreted the legislative voting requirements in the Nevada Constitution to require — solely for the duration of the 20th Special Session — simple majority votes to enact revenue-raising bills. Pet. App. 8a-9a; *Guinn I*, 71 P.3d at 1274-76; *Guinn II*, 76 P.3d at 24-25. Then, also pursuant to its *Guinn I* opinion and order, the Nevada Supreme Court issued a writ of mandamus ordering the Nevada Legislature to proceed with the 20th Special Session using simple majority votes to enact revenue-raising bills. Pet. App. 8a-9a; *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 24.

The period during which the Nevada Supreme Court's *Guinn* Order directed the actions of the Nevada Legislature expired by the terms of the *Guinn* Order itself as of the end of

the 20th Special Session of the Nevada Legislature — specifically, on July 22, 2003. Pet. App. 2a, 9a; *Guinn II*, 76 P.3d at 25, 33. However, a number of the Petitioners in the instant case continued to challenge and appeal the *Guinn* Order. They first filed a petition for rehearing at the Nevada Supreme Court. *Guinn II*, 76 P.3d at 25. When the petition for rehearing failed (*Guinn II*, 76 P.3d at 33), they then appealed the *Guinn* Order to this Court through a petition for a writ of certiorari, which this Court denied. *Angle*, 124 S. Ct. at 1662-63.

Ironically, despite the *Guinn* Order, no revenue-raising bills were actually enacted with less than a two-thirds vote in each house of the Nevada Legislature because the only revenue-raising bill that was enacted, Senate Bill 8, received a two-thirds vote in each house.[2] Pet. App. 2a, 4a; *Guinn II*, 76 P.3d at 33. Senate Bill 8, enacted on July 21, 2003, appropriated money to fund education and increased taxes to balance the budget. *Guinn II*, 76 P.3d at 33. This brought the 20th Special Session to an end and, thereby, caused the *Guinn* Order to expire by its own terms.[3] Pet. App. 3a; *Guinn II*, 76 P.3d at 25, 33.

While the *Guinn* Order was in effect, it changed the result on only one vote in one house of the Nevada Legislature. On July 13, 2003, three days after the *Guinn* Order was issued, the Nevada Assembly voted upon an amended version of Senate Bill 6, a revenue-raising bill which would have required a two-thirds vote for passage in the absence of the *Guinn* Order.[4] Pet. App. 9a. As required by the *Guinn* Order, the Nevada Assembly and its officers and employees

---

[2] The history of Senate Bill 8 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1258.

[3] Both houses of the Nevada Legislature adjourned *sine die* within minutes of 1:30 a.m. on July 22, 2003, less than 3 hours after Senate Bill 8 received final approval by two-thirds votes in both houses.

[4] The history of Senate Bill 6 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1235.

considered Senate Bill 6 to be passed from the Nevada Assembly upon the simple majority vote that occurred on that day. *Id.* However, although the *Guinn* Order would have required Senate Bill 6 to be considered enacted if the Nevada Senate had thereafter approved the Assembly version of Senate Bill 6 by a simple majority vote, such approval from the Nevada Senate never occurred. Pet. App. 4a. Instead, Senate Bill 6 ended up in conference committee, where it died on July 22, 2003, when the 20th Special Session ended.[5]

Petitioners incorrectly assert that the *Guinn* Order also affected the result of the vote on Senate Bill 5, an amended version of which was passed by the Nevada Assembly by a simple majority vote on July 20, 2003 (two days before the *Guinn* Order expired).[6] Pet. 10. Petitioners contend that Senate Bill 5 would have required a two-thirds vote for passage if not for the *Guinn* Order. *Id.* However, as opined by Legislative Counsel Brenda Erdoes on the floor of the Nevada Assembly before the vote on Senate Bill 5, the bill did not raise revenue, and therefore did not require a two-thirds vote, without regard to the *Guinn* Order.[7] Ms. Erdoes' legal opinion, which she provided as part of her official duties as legal counsel to the Nevada Legislature, and which was an interpretation of Nevada law separate from the Nevada Supreme Court's decisions in the *Guinn* litigation, has never been disputed by any court. In any case, Senate Bill 5 was never enacted. It was sent to the Nevada Senate for approval, but no further action was taken on the bill so it died in the Nevada Senate on July 22, 2003, when the 20th Special Session ended.[8]

---

[5] *See supra* notes 3 and 4.

[6] The history of Senate Bill 5 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1232.

[7] Ms. Erdoes opined in response to a question from Assemblyman Beers. Assembly Daily Journal, Twentieth Special Session 2003, The Twenty-Fifth Day, July 19, 2003, *available at* http://www.leg.state.nv.us/20thSpecial/Journal/Assembly/Final/aj025.html.

[8] *See supra* notes 3 and 6.

On July 14, 2003, Petitioners commenced the instant case in the District Court — the day after Senate Bill 6 was passed by the Nevada Assembly upon a simple majority vote (July 13, 2003), and eight days before the 20th Special Session ended (July 22, 2003). Pet. App. 9a. Petitioners brought the instant case seeking declaratory and injunctive relief and nominal damages relating to Respondents' obedience to the *Guinn* Order. *Id.* The District Court found that the *Rooker-Feldman* doctrine prevented the District Court from having subject matter jurisdiction over the claims of the Petitioners who were also parties in the *Guinn* litigation, because the instant case "constitute[d] a direct attack on the [*Guinn*] decision of the Nevada Supreme Court." *Id.* at 12a-13a. For all Petitioners remaining after the application of the *Rooker-Feldman* doctrine, the District Court dismissed the case based upon Petitioners' failing to state a claim upon which relief could be granted, given that Respondents were simply following Nevada law as mandated by the Nevada Supreme Court. *Id.* at 13a-14a. The District Court dismissed the instant case on July 18, 2003. *Id.* at 7a, 14a.

Before the Ninth Circuit could hear Petitioners' appeal of the instant case, the Nevada Legislature enacted Senate Bill 8 with two-thirds votes in both houses, thereby bringing the 20th Special Session to an end. *Id.* at 2a. With the end of the 20th Special Session, the *Guinn* Order expired and Senate Bill 6 died. *Id.* at 3a-4a. The Ninth Circuit found that Petitioners lacked standing to bring their claim for nominal damages and that Petitioners' claims for declaratory and injunctive relief were moot. *Id.* at 3a, 5a.

REASONS FOR DENYING THE PETITION

Petitioners face insurmountable jurisdictional problems, the foremost being that all Petitioners lack standing because all fail the threshold "case or controversy" requirement necessary for standing. Additionally, certain Petitioners and certain claims also fail at the jurisdictional stage based upon

the *Rooker-Feldman* doctrine and, given the events since Petitioners filed the instant case, mootness.

Even if the aforementioned jurisdictional problems did not exist, further features of this case make it an undesirable case for this Court to review. First, the decision below of the Ninth Circuit is an unpublished decision, and even if the decision below had precedential value, it would not create any split of authority. Second, to change the result in this case, this Court would need to depart from its longstanding policy of avoiding the revisiting and overturning of state supreme courts' interpretations of their own state constitutions. Third, there are alternative independent grounds supporting the result in this case — specifically, various forms of immunity applicable to Respondents — which were not reached by the lower courts because of the many threshold problems presented by this case but which nonetheless show that the decisions below reached the right result. Finally, even if we assume, *arguendo*, that the foregoing jurisdictional and other problems did not exist, on the merits, Petitioners have simply brought slightly altered versions of the same claims which this Court declined to hear when certiorari was sought in the *Guinn* case and which still do not merit review.

I. All Petitioners lack standing.

The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In *Lujan*, this Court identified three criteria that Petitioners must satisfy to establish standing. *Id.* at 560. Two of these criteria are most relevant to the instant case. First, "the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations, footnotes and quotations omitted). Second, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a

favorable decision.'" *Id.* at 561. In the instant case, all Petitioners have failed to satisfy these criteria.[9]

A. Petitioners may be categorized as Legislator Petitioners, Voter Petitioners and Taxpayer Petitioners.

The entire group of Petitioners can be divided into three categories such that every petitioner falls into at least one category. First, the category of "Legislator Petitioners" includes those Petitioners who are Legislators. Pet. 8; Pet. App. 9a. They assert claims based upon nullification or dilution of their votes as Legislators. Pet. 8; Pet. App. 9a. Second, the category of "Voter Petitioners" includes those Petitioners who assert claims related to voting. Pet. 8; Pet. App. 9a. Third, the category of "Taxpayer Petitioners" includes those Petitioners who assert claims related to the possibility of paying Nevada taxes enacted with less than a two-thirds vote in each house of the Nevada Legislature. Pet. App. 9a.

B. Legislator Petitioners lack standing.

Legislator Petitioners contend that their votes as Legislators were diluted because the *Guinn* Order required revenue-raising bills during the 20th Special Session to be considered passed on simple majority votes rather than two-thirds votes. Pet. 8, 22. However, the *Guinn* Order applied to all members of both houses equally. Thus, Legislator Petitioners' claim is a claim of an institutional injury.[10]

---

[9] The remaining criterion is that "there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (alteration in original). Petitioners may even fail here, as the Nevada Supreme Court, not Respondents, caused the alleged injuries. *Cf. Raines v. Byrd*, 521 U.S. 811, 830 n.11 (1997).

[10] *Raines*, 521 U.S. at 821 ("[A]ppellees have not been singled out for specially unfavorable treatment as opposed to other Members of their

Because they are claiming an institutional injury, Legislator Petitioners' standing is governed by this Court's precedents in *Raines v. Byrd*, 521 U.S. 811 (1997) and *Coleman v. Miller*, 307 U.S. 433 (1939). *Raines*, 521 U.S. at 821. In *Coleman*, 20 of 40 Kansas Senators were found to have standing to assert an institutional injury based upon the Kansas Legislature's enactment of a resolution over the 20 Senators' "no" votes. *Coleman*, 307 U.S. at 438. The resolution was enacted by the Kansas Legislature when the Lieutenant Governor, as presiding officer of the Senate, cast the tie-breaking vote to override the "no" votes of the 20 Senators, and then the lower house of the Kansas Legislature also voted to approve the resolution. *Id.* at 436. As stated by this Court in *Raines*:

> It is obvious, then, that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue *if that legislative action goes into effect (or does not go into effect)*, on the ground that their votes have been completely nullified.

Raines, 521 U.S. at 823 (emphasis added and footnotes omitted). Thus, the 20 Senators had standing because *if* they succeeded in their claim that the Lieutenant Governor should not have been able to vote, *then* the effectiveness of the legislative action would have been reversed.[11] Their cognizable injury in fact was that the bill went into effect over their "no" votes, and the redress available from a

---

respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.").

[11] *See also Gutierrez v. Pangelinan*, 276 F.3d 539, 545-46 (9th Cir. 2002); *Campbell v. Clinton*, 203 F.3d 19, 29, 31 (D.C. Cir. 2000) (Randolph, J., concurring); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999).

favorable decision was to cause the resolution not to be effective.[12]

Application of *Coleman*, as clarified by *Raines*, to the facts of the instant case shows that Legislator Petitioners do not have standing to bring their institutional injury claim. First, no legislation went into effect over the "no" votes of one-third of the members of either house of the Nevada Legislature. *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). Hence, there is no cognizable injury. Second, because no legislation went into effect, there is no legislation for this Court to cause *not* to be effective if Legislator Petitioners receive a favorable decision. Hence, there is no redress available.[13] *If* a revenue-raising bill *had gone into effect* despite the requisite number of Legislator Petitioners' "no" votes, *then* the Legislator Petitioners would have had standing to assert their institutional injury pursuant to *Raines* and *Coleman*. But that simply did not happen.[14]

---

[12] Petitioners assert that there was no injury for this Court to redress in *Coleman* because the resolution at issue was a resolution in which the Kansas Legislature ratified a proposed amendment to the United States Constitution, and the constitutional amendment never ultimately garnered enough state ratifications to become effective. Pet. 25. However, Petitioners misread *Coleman*. When this Court decided *Coleman*, this Court noted that the ratification of the proposed amendment by an adequate number of states was an ongoing possibility. *Coleman*, 307 U.S. at 452. Thus, the Kansas Legislature's ratification had a live and ongoing significance, and the real and significant remedy this Court could offer the Senators was to cause Kansas's ratification not to be effective.

[13] Respondents note that psychic satisfaction and payment for attorney's fees accrued in maintaining the instant case are inadequate forms of redress to support standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

[14] Legislator Petitioners urge this Court to break from its established jurisprudence regarding institutional injuries to address controversies

The stumbling block for Legislator Petitioners is that, when the instant case was brought in District Court, their claim was not yet ripe because Senate Bill 6 was still mired at an intermediate stage in the legislative process (and then their claim never did ripen because Senate Bill 6 ultimately died in that legislative process).[15] When this case was brought, it

---

concerning legislation at intermediate steps in the legislative process. Pet. 25. In support of their position, Petitioners argue that the Kansas Legislature's resolution in *Coleman*, which finalized Kansas's ratification of the amendment to the United States Constitution, was simply one step toward ultimate approval of the amendment. Pet. 25. Petitioners analogize the constitutional amendment ratification process in *Coleman* to the Nevada Legislature's process in enacting bills through passage in two separate houses. *Id.* However, this analogy fails because the Kansas Legislature's resolution was a completed legislative act of the Kansas Legislature while Senate Bill 6 was not a completed act of the Nevada Legislature. Legislative resolutions sometimes do nothing more than state a legislature's official position, with perhaps little or no effect upon the law of the land, but they are still completed legislative acts. Petitioners' analogy would be more appropriate if, instead of challenging Senate Bill 6, they were challenging a one-house resolution adopted by the Nevada Assembly which expressed the position of the Nevada Assembly in an official and final manner. But those are not the facts of this case.

[15] As stated by now-Justice Stevens: "As federal judges we are satisfied that we may not participate in preliminary stages of a State's legislative process." *Dyer v. Blair*, 390 F. Supp. 1287, 1289 (N.D. Ill. 1974) (finding unripe a challenge to the defeat of a resolution by the Illinois House of Representatives because of the House's enforcement of an allegedly unconstitutional requirement of a three-fifths vote for passage, with the court finding a lack of ripeness because the Illinois Senate had not yet acted (and ultimately did not act) on the resolution). *Cf. National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-08 (2003) ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference *until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.*") (emphasis added and quotations and citations omitted). The District Court recognized the

was still possible that Senate Bill 6 could have been approved by both houses of the Nevada Legislature on two-thirds votes. For example, if the conference committee had not let Senate Bill 6 die, but instead had returned the bill with a compromise position reconciling the competing Assembly and Senate versions of the bill, then another vote by each house would have been necessary before the bill could have been enacted. At that point, each house might have approved the compromise bill by a two-thirds vote. This is just one of many possibilities as to how the Nevada Assembly might have had another opportunity to obtain a two-thirds vote on Senate Bill 6. Further, when this case was brought, it was reasonable to believe that Senate Bill 6 might not go into effect — as shown by the fact that it never did. The point of these observations is that, until a legislative process is complete, it is impossible to know what its results will be.[16] So disagreements (such as the one in the instant case) regarding incompletely-processed legislative acts are necessarily abstract, hypothetical and based upon conjecture. They simply are not ripe — and in the instant case, Petitioners' claims never did ripen.

C. Voter Petitioners lack standing.

Voter Petitioners raise two distinct claims. First, Voter Petitioners . proffer the derivative claim that the alleged institutional injury suffered by Legislator Petitioners is also an injury to Voter Petitioners. Pet. 26. With regard to this alleged institutional injury, if Legislator Petitioners have no cognizable injury in fact which can be redressed by a favorable decision, then neither do Voter Petitioners.

As discussed in Part I.B., *supra*, pursuant to the precedent of this Court in *Raines* and *Coleman*, as applied to the facts

---

ripeness issue, but disposed of the case otherwise. Pet. App. 14a ("[W]e need not address the substantial issues of immunity and ripeness.").

[16] *Perry v. Del Rio*, 66 S.W.3d 239, 255 (Tex. 2001) ("[P]redictions about the probable course of the legislative process are notoriously unreliable, as anyone remotely familiar with the process well knows.").

of the instant case, Legislator Petitioners could not establish a cognizable injury in fact regarding their claim of an institutional injury, and, in any case, a favorable decision could not redress Legislator Petitioners' alleged institutional injury. As also discussed in Part I.B., *supra*, Legislator Petitioners' claim was not ripe when brought, and never ripened. Because Voter Petitioners' first claim is simply derivative of Legislator Petitioners' claim, the same infirmities cause Voter Petitioners not to have standing to bring their first claim.

Before turning to Voter Petitioners' second claim, Respondents note that even if Legislator Petitioners could establish a cognizable injury in fact regarding an institutional injury which could be redressed by a favorable decision, it does not necessarily follow that Voter Petitioners have standing to bring their derivative claim. The *Guinn* Order applied to all Legislators equally and so affected equally the representation provided to all Nevadans. The *Guinn* Order did not provide that the representation provided to any specific and identifiable Nevadan would be reduced as compared to any other Nevadan. Thus, even if Legislator Petitioners had a viable claim of an institutional injury (which they do not), Voter Petitioners would still need to show that all Nevadans (because Voter Petitioners are not distinguishable) have standing to bring suit on an alleged institutional injury suffered by all Nevada Legislators equally.[17] In fact, there is authority to suggest the

---

[17] Although Petitioners cite the D.C. Circuit's decision in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), *Michel* does not address this circumstance even if we assume, *arguendo*, that the *Michel* Court's reasoning still has validity on this point. *See* Part IV.E., *infra* (discussing the fact that *Michel* does not represent the D.C. Circuit's current jurisprudence). In *Michel*, unlike the instant case, the D.C. Circuit was addressing a circumstance in which specific and identifiable constituents (i.e., constituents of representatives from states such as Illinois) were having their representatives' voting power reduced so as to increase the voting power of the delegates of other specific and identifiable

opposite — that such general claims of improper conduct by the government, without particularized injury to the Voter Petitioners, are insufficient to sustain standing.[18]

Voter Petitioners' second claim is that their votes for the Gibbons Initiative, which was the ballot question by which the two-thirds vote requirement for revenue-raising bills was added to the Nevada Constitution, were diluted by the *Guinn* Order. Pet. 5 n.1, 8, 27. Significantly, Voter Petitioners do not claim any problem with the two elections, in 1994 and 1996, in which the Gibbons Initiative was approved as an amendment to the Nevada Constitution.[19] Instead, Voter Petitioners' claim is that they do not agree with the manner in which the two-thirds vote requirement has been interpreted by the Nevada Supreme Court in the *Guinn* decisions. Respondents observe that once the two-thirds vote requirement became part of the Nevada Constitution, it became the law for all Nevadans, not only those who voted for it. Thus, Voter Petitioners' claim is the same as the claim that could be brought by any Nevadan — specifically, the allegation that entities, officers and employees of the State Government are not following the Nevada Constitution as the claimants believe it should be followed. However, a general claim that the government is not following the law, absent some particularized injury to the claimant, does not give the claimant a cognizable injury in fact sufficient to establish standing.[20] Therefore, Voter Petitioners fail to establish standing for their second claim.

---

constituents (i.e., constituents of delegates from non-state jurisdictions such as Puerto Rico). *Michel*, 14 F.3d at 626.

[18] *See infra* note 20.

[19] The Nevada Constitution requires that amendments to the Nevada Constitution via initiatives be approved twice. Nev. Const. art. 19, § 2.

[20] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent. An interest shared generally with the public at large in the proper application of the Constitution and laws

D. Taxpayer Petitioners lack standing.

Taxpayer Petitioners participated in the instant case to enjoin the operation of the *Guinn* Order so as to prevent the possibility that Taxpayer Petitioners might be required to pay a tax enacted without a two-thirds vote in each house of the Nevada Legislature. Pet. 9a. However, no tax was enacted without a two-thirds vote in each house of the Nevada Legislature, either at the time the instant case was filed or thereafter. Pet. App. 2a-4a; *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). Given these facts, Taxpayer Petitioners' claims were not ripe when the instant case was filed, and never became ripe.[21] In short, Taxpayer Petitioners never suffered a cognizable injury in fact, and there never was anything for a favorable decision to redress.

II. The *Rooker-Feldman* doctrine applies to Legislator Petitioners, but is not necessary to this case.

All Legislator Petitioners were parties to the *Guinn* case at the Nevada Supreme Court. Pet. App. 12a. In the *Guinn* litigation, Legislator Petitioners attacked the Nevada Supreme Court's *Guinn* Order directly. In the instant case, Petitioners, including Legislative Petitioners, attack the *Guinn* Order indirectly by attacking Respondents for obeying the *Guinn* Order. Thus, as the District Court observed, Petitioners in the instant case were, in essence, requesting that the District Court review and overturn the Nevada Supreme Court's decision in *Guinn I*. Pet. App. 12a. Therefore, pursuant to this Court's precedent in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), the District Court recognized that it did not have

---

will not do.") (quotations and citations omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 175 (1974).

[21] *Cf. National Park Hospitality Ass'n*, 538 U.S. at 807-08; *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

subject matter jurisdiction over the Legislator Petitioners' claims. Pet. App. 12a.

However, the *Rooker-Feldman* doctrine is not necessary to the result of the instant case. All Petitioners lack standing, in addition to the other infirmities of this case raised by Respondents in the remainder of the instant brief. The *Rooker-Feldman* doctrine does nothing more than present just one more reason why Legislator Petitioners' claims should fail at the jurisdictional level of inquiry. Thus, there is no need for this Court, as proposed by Petitioners (Pet. 10 n.4), to hold this Petition until this Court resolves *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3rd Cir. 2004), *cert. granted* 2004 WL 2058940 (U.S. Oct. 12, 2004) (No. 03-1696).

III. Petitioners' claims for declaratory and injunctive relief are moot.

A. Petitioners' claims for declaratory relief are moot.

Petitioners sought declaratory judgments that the Nevada Assembly's treatment of Senate Bill 6 as passed on a simple majority vote violated the Nevada Constitution and diluted their votes. Pet. App. 9a. However, when a party's requested relief can no longer affect the rights of the parties to the case, or the issues in the case are otherwise no longer live, then the claim for declaratory relief is moot.[22] As correctly noted by the Ninth Circuit below, Petitioners' claims for declaratory

---

[22] *Lewis*, 494 U.S. at 477 ("Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (quotations and citations omitted). *See also Arizonans for Official English*, 520 U.S. at 48; *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982); *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

relief are moot because Senate Bill 6 died without being enacted. Pet. App. 2a-3a. Senate Bill 6 will be treated in exactly the same manner without regard to any decision in the instant case — specifically, it will be treated as a bill which was not enacted. Therefore, Petitioners' claims for declaratory relief are moot.

Before leaving this point, Respondents note that, under certain circumstances, a claim for declaratory relief can survive mootness if it is needed as a predicate for monetary relief.[23] In the instant case, Petitioners did seek nominal damages. Pet. 8. However, as the Ninth Circuit correctly noted below, Petitioners lacked standing to bring their claims for damages. Pet. App. 5a. *See also* Parts I.B., I.C. and I.D., *supra*. Further, even if Petitioners had standing, Petitioners' claims for damages should fail based upon Respondents' immunity. *See infra* Part VI. When a claim for damages that was initially brought in a case is not viable, or at some point loses viability, then that claim for damages cannot save from mootness a related claim for declaratory relief that is otherwise moot.[24]

B. Petitioners' claims for injunctive relief are moot.

Petitioners sought to enjoin Respondents from considering Senate Bill 6 or any other revenue-raising bills to be passed or enacted with less than a two-thirds vote in each house of the Nevada Legislature. However, when the issues in a case are no longer live, then a claim for injunctive relief in that case is moot.[25] As correctly noted by the Ninth Circuit below, Petitioners' claims for injunctive relief are moot. Pet. App. 3a. The claims are moot, quite simply, because Senate Bill 6 died and the *Guinn* Order expired without any revenue-raising bill being enacted with less than

---

[23] *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

[24] *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (finding claim for declaratory relief moot after claim for damages eliminated).

[25] *See supra* note 22.

a two-thirds vote in each house. Further, now that the *Guinn* Order has expired, Respondents have no duty or authority, and have not even claimed any duty or authority, to treat revenue-raising bills as passed or enacted with less than a two-thirds vote. Therefore, Petitioners' claims for injunctive relief are moot.

C. The exception to mootness for "voluntary cessation" does not apply.

As the Ninth Circuit correctly held, the voluntary cessation exception to mootness does not apply to the instant case. Pet. App. 3a. The voluntary cessation exception exists to ensure "that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."[26] Without this exception, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'"[27] When determining whether a case is rendered moot by "a defendant's *voluntary* conduct," this Court applies the following standard: "'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not *reasonably* be expected to recur.'"[28] In determining what is needed to establish such a reasonable expectation, this Court has explained that "'pleadings must be something more than an ingenious academic exercise in the conceivable.'"[29]

---

[26] *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

[27] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000) (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

[28] *Friends of the Earth*, 528 U.S. at 189 (emphasis added) (*quoting United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

[29] *Preiser*, 422 U.S. at 403 (*quoting United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973)). *See also City of Erie v. PAP'S A.M.*, 529 U.S. 277, 303 (2000) (Scalia, J., concurring) ("The test for mootness we have applied in voluntary-termination cases is not whether the action originally giving rise to the

In the instant case, Respondents did not voluntarily decide that they would consider revenue-raising bills to be passed and enacted on simple majority votes. That decision was made by the Nevada Supreme Court by the terms of its *Guinn* Order, the issuance of which the Nevada Legislature fought against. Respondents also did not voluntarily decide that they would cease to consider revenue-raising bills to be passed and enacted on simple majority votes. That decision, too, was made by the Nevada Supreme Court by the terms of its *Guinn* Order. Further, there is no possibility that the effectiveness of the *Guinn* Order will recur — that fact is assured by the terms of the *Guinn* Order. As the Ninth Circuit found:

> Neither of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB 6 itself) may ever be repeated, as they were both directed to specific periods in time that have already passed (i.e., the 20th Special Session, and the period for planning the 2004 budget).

Pet. App. 3a. Finally, with or without the *Guinn* Order, there is no reason to believe that Respondents will ever voluntarily choose to consider revenue-raising bills as passed or enacted on simple majority votes, as they never voluntarily chose to do so in the first place.

Putting aside the issues of the involuntary nature of Respondents' conduct, as well as the final and complete expiration of the *Guinn* Order, it is additionally worth noting that it is highly unlikely that the special circumstances which led to the decision in *Guinn I* would ever recur, much less

---

controversy could not *conceivably* reoccur, but whether it is 'absolutely clear that the . . . behavior could not *reasonably be expected to recur.*'") (emphasis added) (*quoting Concentrated Phosphate Export Ass'n,* 393 U.S. at 203).

recur *and then also* result in the issuance of a *Guinn*-like order, especially during the 2005 Legislative Session. Such a recurrence would require the combination of several extraordinary factors. First, the State of Nevada would have to find itself in dire economic conditions as it did in 2003 when the State grappled with the economic losses suffered by the gaming and tourism industries as a result of the historic "9/11" attack on our nation. This factor seems highly unlikely, especially for 2005, as Nevada's state revenues continue to exceed earlier expectations.[30] Second, the Legislature would have to be at an impasse with education as the last item still unfunded. After 2006, it may be impossible for this particular factor to recur. The voters recently passed Question 1 on the Nevada 2004 General Election Ballot which, if passed by the voters again in 2006, will amend the Nevada Constitution to require that education be funded *first*, thereby avoiding forever the circumstances that precipitated the decision in *Guinn I*. Third, the Governor would have to take the unusual step of bringing an action in the Nevada Supreme Court to request the issuance of a writ of mandamus against the Nevada Legislature. Finally, the Nevada Supreme Court would have to take the unusual step of again issuing such a writ of mandamus ordering the Nevada Legislature to proceed on revenue-raising bills under simple majority rule. This factor is especially unlikely to recur as the composition of the Nevada Supreme Court has changed considerably since the *Guinn* decisions. Four of the seven justices who will

---

[30] Cy Ryan, *Rainy day fund gets boost from economy*, Las Vegas Sun, December 7, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/sun/2004/dec/07/517944441.html?cy%20ryan%20rainy%20day ("After the Economic Forum last week made its predictions of tax collections for the coming two years, legislative fiscal experts estimated there will be $330 million extra on June 30, 2005, the end of this fiscal year."). *See also* State of Nevada Economic Forum, Forecast of Future State Revenues, December 1, 2004, at p. 7, *available at* http://www.leg.state.nv.us/lcb/fiscal/Economic%20Forum/EF%20Dec%201%202004%20Report.pdf.

serve on the Nevada Supreme Court as of January 1, 2005, appear to disagree with, or at least question, the decisions issued in *Guinn*.[31] Therefore, even in the unlikely event that another case similar to *Guinn* is presented to the Nevada Supreme Court, it would not be reasonable to expect the same decisions.

D. The exception to mootness for "capable of repetition yet evading review" does not apply.

As the Ninth Circuit correctly held, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply to the instant case. Pet. App. 3a. This Court has consistently held that:

> [T]he capable-of-repetition doctrine *applies only in exceptional situations,* where the following *two*

---

[31] Justice Maupin, who still serves on the Nevada Supreme Court, dissented in part to the decision in *Guinn I.* Since the *Guinn* decisions, three of the other six justices have been replaced. The new justices, Justice Douglas, Justice Hardesty and Justice Parraguirre, were recently elected to the Court, and each justice has commented on the decision in *Guinn I. See* Don Cox, *Candidates come to dinner: Hopefuls discuss issues at tables of local residents,* Reno-Gazette Journal, October 27, 2004, *available at* http://www.rgj.com/news/stories/html/2004/10/26/83742.php ("Was the Supreme Court correct when it ruled last year to allow the Legislature to pass a tax hike without the two-thirds majority vote required by the constitution? Hardesty: No. I disagreed with the court's handling of the case and the analysis of the decision."); Carri Geer Thevenot, *SUPREME COURT: Challenger holds lead on justice: Poll shows Guinn appointee slightly trailing Las Vegas attorney*, Las Vegas Review-Journal, October 22, 2004, *available at* http://www.reviewjournal.com/lvrj_home/2004/Oct-22-Fri-2004/news/25066004.html ("Douglas has said he thinks the justices acted prematurely with their ruling in Guinn v. Legislature. He said they should have told lawmakers 'to go back to work and not come back until they passed a budget.'"); Erin Neff, *'$1 million race' begins in earnest*, Las Vegas Review-Journal, April 28, 2004, *available at* http://www.parraguirre2004.com/news3.html ("'I may not agree with that decision, and I may not have ruled that way,' Parraguirre said . . .'I wasn't privy to the extensive briefing that took place in that case. I wasn't privy to any of the arguments.'").

> *circumstances* [*are*] *simultaneously present:* (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, *and* (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.

Spencer v. Kemna, 523 U.S. 1, 17 (1998) (emphasis added and quotations and citations omitted). Further, this Court has explained that:

> [This] Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test [described in *Spencer,* above]. . . . Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

Murphy v. Hunt, 455 U.S. 478, 482 (1982) (*quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

In considering these rules and explanations, it is clear that this exception to mootness does not apply because there is not any reasonable expectation that the same allegedly harmful acts will recur involving Petitioners or anyone else. As the Ninth Circuit found, it is impossible for the specific acts at issue in the instant case (e.g., compliance with the *Guinn* Order) ever to be repeated. Pet. App. 3a. Further, as discussed in Part III.C., *supra*, there is not any reasonable expectation that the unique combination of special circumstances which led to *Guinn I* will recur and also result in a future *Guinn*-like order.

IV. The Ninth Circuit's decision below does not create any split of authority.

The decision below of the Ninth Circuit is an unpublished decision, but even if the decision below had precedential value, it would not create any split of authority.

A. There is no conflict with the Seventh Circuit regarding the mootness of claims for declaratory relief.

Petitioners forget a pertinent aspect of the instant case — specifically, their lack of standing to bring their claims for nominal damages — while asserting a false conflict between the Ninth Circuit's decision below and the Seventh Circuit's decision in *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). Pet. 19. Petitioners correctly identify the legal principle at issue, which is that a claim for declaratory relief which would otherwise be moot can remain live if needed as a predicate for a live claim for damages.[32] Pet. 19. The Ninth Circuit has demonstrated its awareness of this legal principle, as exemplified in *Rhodes v. Robinson*, 380 F.3d 1123, 1128 n.8 (9th Cir. 2004). However, in the instant case, the Ninth Circuit correctly found that Petitioners failed to establish standing to bring their claims for nominal damages, so those claims for damages were not live. Pet. App. 4a-5a. *See also* Parts I.B., I.C. and I.D., *supra*. Therefore, because there was no live claim for damages for which Petitioners' claim for declaratory relief was needed, the Ninth Circuit was able to correctly find that the claim for declaratory relief was moot without any conflict with the Seventh Circuit in *Crue*.[33]

B. There is no conflict with the First Circuit regarding the mootness exception for "capable of repetition yet evading review."

Petitioners misread the Ninth Circuit's decision below in asserting a false conflict between the Ninth Circuit's decision below and the First Circuit's decision in *Becker v. Federal Election Comm'n*, 230 F.3d 381 (1st Cir. 2000). Pet. 21. The First Circuit focused on the likelihood of repetition — specifically, the practically certain nature of corporate

---

[32] *See Wolff*, 418 U.S. at 555; *Crue v. Aiken*, 370 F.3d 668, 677-78 (7th Cir. 2004).

[33] *See Ashcroft*, 431 U.S. at 172 (finding claim for declaratory relief moot after claim for damages eliminated).

sponsorship of presidential debates in the future — as well as the short length of a presidential election campaign season. *Becker*, 230 F.3d at 389. The Ninth Circuit did not forget about the short length of Nevada legislative sessions. Rather, the Ninth Circuit focused on the fact that Petitioners' alleged injuries concerned the *Guinn* Order, which had permanently expired, so the injuries could not recur. Pet. App. 3a. *See also* Part III.C., *supra*. Not only was the Ninth Circuit correct in finding that Petitioners' alleged injuries could not recur, but even if we assume, *arguendo*, that the Ninth Circuit's factual finding was wrong, the Ninth Circuit was still applying the same test as the First Circuit and simply coming to a different conclusion by applying the same test to different facts. Thus, there is no conflict.

C. There is no conflict with the cases cited by Petitioners regarding the standing of Legislators to bring institutional injury claims.

Petitioners misread or misapply a number of cases throughout their discussion of Legislator Petitioners' standing (*see* Pet. 22-26), and Respondents address the most significant of these mistakes here. First, as already discussed in Part I.B., *supra*, this Court's decisions in *Raines* and *Coleman* require that Legislator Petitioners be found *not* to have standing to bring their claim of an institutional injury because Legislator Petitioners sought to *defeat* a legislative measure and, in fact, that legislative measure *did not go into effect*. Thus, the Ninth Circuit correctly followed *Raines* and *Coleman* in finding Legislator Petitioners lacked standing. Therefore, there is no conflict.[34]

---

[34] Here, Petitioners also incorrectly assert a conflict with the Ninth Circuit's own precedent in *Gutierrez*, 276 F.3d at 545-46. In *Gutierrez*, the Ninth Circuit correctly found that the Governor of Guam had standing to bring his institutional injury claim because (1) his "vote" alone (i.e., approving or vetoing legislation) should have been enough to approve the legislation in question, and (2) the legislation he sought to approve did *not* go into effect despite what he alleged was his "vote" of approval. *Id.*

Next, Petitioners invoke *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997), *Conway v. Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997), and *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), for the proposition that it is possible for a due process violation to occur if a state legislature does not follow its own procedures. Pet. 23. These are the cases regarding which Petitioners mistakenly assert that there are conflicts involving the Fourth and Ninth Circuits and the District of Vermont. Pet. 25. However, none of these cases involve claims of an institutional injury. Further, in none of these cases was standing even an issue, as the plaintiffs in these cases (unlike the Petitioners in the instant case) alleged concrete and particularized injuries sufficient to support standing.[35] Therefore, none of these cases conflict with the Ninth Circuit's decision below regarding Legislator Petitioners' standing to bring claims of institutional injuries.

Petitioners also misread this Court's dicta in footnote 7 of *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986). In footnote 7, this Court hypothesized that *if* state law had provided that the school board in question could only take its action (i.e., decide to forgo the appeal in question) by unanimous consent, but the board had put its action into effect over the dissent of one member, *then* the dissenter would have standing under *Coleman*. Such reasoning is consistent with the Ninth Circuit's application of *Raines* and *Coleman* in the decision below because, in accordance with this hypothetical, the dissenter's vote should have been enough to defeat the action but the action nonetheless was *put into effect*, thereby fulfilling the requirements for standing to challenge the institutional injury. Therefore, there is no conflict.

---

[35] *Rea v. Matteucci*, 121 F.3d 483, 484 (9th Cir. 1997); *Conway v. Searles*, 954 F. Supp. 756, 759 (D. Vt. 1997); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1154 (4th Cir. 1991).

D. There is no conflict with the First, Fifth, Eighth and D.C. Circuits regarding standing for individual voters to bring vote dilution claims.

Petitioners misread the Ninth Circuit's decision below in asserting a false conflict with this Court and with the First, Fifth, Eighth and D.C. Circuits in *Miller v. Johnson*, 515 U.S. 900 (1995), *Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395 (8th Cir. 1985), *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (*citing United States v. AVX Corp.*, 962 F.2d 108, 113-14) (1st Cir. 1992), *Daughtrey v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978), *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976), and *Locklear v. North Carolina State Bd. of Elections*, 514 F.2d 1152 (4th Cir. 1975).[36] Pet. 26. Petitioners mistakenly assert that the Ninth Circuit implicitly adopted the following test with regard to standing for individual voters bringing vote dilution claims: "Vote dilution or outright vote nullification claims by individual voters could only be sustained if the candidate opposed (or supported) by the disenfranchised voters was actually elected (or defeated)." Pet. 25. The Ninth Circuit adopted no such test and never applied any such test to individual voters. Instead, with regard to determining the standing of the Legislator Petitioners to bring their claim of an institutional injury, the Ninth Circuit quoted and applied this Court's decision in *Raines*, as follows: "[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Pet. App. 5a (*quoting Raines*, 521 U.S. at 823). Although Legislator Petitioners styled their claim as a claim for dilution of their votes as Legislators, the Ninth Circuit implicitly and correctly treated this claim as a claim of an institutional injury which was subject to the standing requirements of this

---

[36] Respondents address *Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997), in Part IV.E., *infra*.

Court's decisions in *Raines* and *Coleman*. Pet. App. 5a. *See also* Part I.B., *supra*. With regard to the remainder of the alleged "vote dilution" claims, as brought by the Voter Petitioners, these claims also were not actual vote dilution claims. Instead, Voter Petitioners asserted a derivative institutional injury claim and a generalized claim that the government was not following the law, neither of which Voter Petitioners had standing to bring. *See* Part I.C., *supra*. Thus, as the Ninth Circuit did not adopt or apply the test Petitioners attribute to the Ninth Circuit, there is no conflict with this Court and the First, Fifth, Eighth and D.C. Circuits.

E. There is no conflict with the D.C. Circuit's *current* jurisprudence regarding standing.

Petitioners rely on the D.C. Circuit's decisions in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), and *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997), for a number of propositions regarding standing to maintain claims of institutional injuries. Pet. 23, 26, 29. However, these opinions are not the current jurisprudence of the D.C. Circuit on these issues. After this Court's decision in *Raines*, which specifically identified *Michel* and then did not follow the reasoning in *Michel* (*see Raines*, 521 U.S. at 816), the D.C. Circuit changed its approach to standing for claims of institutional injuries, as exemplified by the post-*Raines* D.C. Circuit case of *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).[37] Thus, there is no conflict.

V. To alter the result in this case, this Court would need to revisit and overturn the Nevada Supreme Court's interpretation of its own state constitution.

In deciding the *Guinn* cases, the Nevada Supreme Court determined that the facts and circumstances present during the 20th Special Session produced an "irreconcilable conflict" between certain provisions of the Nevada

---

[37] *See also Chenoweth*, 181 F.3d at 116.

Constitution, and therefore interpreted one of these provisions (i.e., funding education) to have precedence over another of these provisions (i.e., a two-thirds vote to enact revenue-raising bills). *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 25. In accordance with this interpretation, the Nevada Supreme Court then ordered the Nevada Legislature to proceed under simple majority rule during the 20th Special Session. *Guinn I*, 71 P.3d at 1276. Thus, the Nevada Supreme Court's *Guinn* decisions and the resultant *Guinn* Order were based solely and completely upon the Nevada Supreme Court's interpretation of the Nevada Constitution.

In the instant case, Petitioners' contentions boil down to nothing more than assertions that Respondents complied with, and intended to continue to comply with, the *Guinn* Order and the provisions of the Nevada Constitution as interpreted by the Nevada Supreme Court in *Guinn*.[38] Thus, unless this Court revisits and overturns the Nevada Supreme Court's interpretation of the Nevada Constitution in *Guinn*, Petitioners have no case. In dismissing the instant case, the District Court noted this fact when it stated that "[u]nless the Nevada Supreme Court's decision in *Guinn v. Legislature* is set aside, the defendants herein were in compliance with the law as mandated by the highest court of the State of Nevada." Pet. App. 14a.

This Court has long followed a policy of avoiding the revisiting and overturning of a state supreme court's interpretation of its own state constitution.[39] If this Court

---

[38] Of course, Petitioners would contend that the Nevada Supreme Court's interpretation of the Nevada Constitution in *Guinn* was incorrect. But, as previously stated, Legislator Petitioners have already challenged and appealed *Guinn* to the fullest extent possible, and the *Guinn* decisions were never found to be incorrect. *Angle*, 124 S. Ct. at 1662-63; *Guinn II*, 76 P.3d at 33.

[39] *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979) ("[T]his Court must accept whatever construction of a state constitution is placed upon it by the highest court of the State."). *See also Arizona v. Evans*, 514 U.S. 1, 9 (1995); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207,

simply maintains its longstanding policy, then all claims of all Petitioners fail.

VI. Alternative independent grounds — specifically, immunity — support the result in this case.

In addition to the foregoing, the District Court and the Ninth Circuit could have reached the same result — specifically, a result favorable to Respondents — by considering the immunity of the various Respondents.[40] This is especially relevant with regard to Petitioners' claims for damages pursuant to 42 U.S.C. § 1983 (2003).

First, as Respondents Nevada Legislature, Nevada Assembly and Nevada Senate are institutional arms of the State of Nevada, all are immune from Petitioners' suit pursuant to the Eleventh Amendment to the United States Constitution.[41] Further, Respondents Hon. Richard Perkins, Speaker of the Nevada Assembly, and Hon. Lorraine Hunt, Lieutenant Governor and President of the Senate, as officers of the State being sued in their official capacities, also enjoy a degree of Eleventh Amendment immunity.[42]

---

226 n.9 (1980); *Williams v. Eggleston*, 170 U.S. 304, 310-11 (1898); *Nesmith v. Sheldon*, 48 U.S. 812, 818 (1849). *Cf. Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. This proposition, fundamental to our system of federalism, *is applicable to procedural as well as substantive rules*.") (emphasis added and citations omitted).

[40] The District Court recognized the immunity issue, but disposed of the case otherwise. Pet. App. 14a ("[W]e need not address the substantial issues of immunity and ripeness.").

[41] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62 (1989); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); Nev. Rev. Stat. 41.031(3) (2003) (providing that Nevada does not waive its Eleventh Amendment immunity).

[42] *Arizonans for Official English*, 520 U.S. at 69 n.24 ("State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983."). Additionally, Respondent Perkins, an Assemblyman as well as Speaker of the Nevada Assembly, enjoys absolute immunity from suit brought under 42 U.S.C. § 1983 while acting

Second, Respondents Hunt and Perkins, to the extent not covered by the Eleventh Amendment immunity discussed above, and Respondents Jacqueline Sneddon, Diane Keetch, Brenda Erdoes and Claire Clift, who are all employees of the Nevada Legislature being sued in their official capacities, raised in the District Court and continue to maintain the affirmative defense that Respondents acted based upon a good faith belief that their actions were lawful.[43] This affirmative defense is a type of qualified immunity, applicable to the officers and employees of the Nevada Legislature in the instant case because they do not exercise broad independence of judgment with respect to performing the official duties concerning which Petitioners complain — specifically, the treatment of a bill as passed or defeated upon a given vote.[44]

VII. On the merits, Petitioners bring only slightly altered versions of the same claims which this Court has already declined to hear in *Guinn* and which still do not merit review.

In petitioning this Court for a writ of certiorari in the instant case, Petitioners have brought claims which in substance are the same claims Legislator Petitioners brought to this Court in the appeal of the *Guinn* case and which this Court declined to hear. *Angle*, 124 S. Ct. at 1662-63. In

---

in his capacity as a State Legislator. *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 732-34 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 377-79 (1951).

[43] *Cf. Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("[W]e have held, on the basis of [c]ommon-law tradition . . . and strong public-policy reasons, that certain categories of executive officers should be allowed qualified immunity from liability for acts done on the basis of an objectively reasonable belief that those acts were lawful.") (quotations and citations omitted); *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *Wood v. Strickland*, 420 U.S. 308, 320-22 (1975); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Morales v. Vega*, 483 F. Supp. 1057, 1060 (D.P.R. 1979).

[44] *See supra* note 43.

Guinn, the Legislator Petitioners claimed that the Nevada Supreme Court had committed various constitutional violations in its issuance of the *Guinn* Order. In the instant case, Petitioners claim that Respondents have committed these violations by following the *Guinn* Order. Pet. App. 14a. At their core, they are the same claims, even including the nonjusticiable political questions arising from the alleged violations of the Guarantee Clause of Article IV of the United States Constitution. Pet. 8, 12. These claims did not merit review then, and still do not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. KEANE
Counsel of Record
SCOTT G. WASSERMAN
LESLIE HAMNER
M. SCOTT MCKENNA
R. RENE YECKLEY
LEGISLATIVE COUNSEL BUREAU
NEVADA STATE LEGISLATURE
401 S. Carson Street
Carson City, NV 89701
(775) 684-6830

Counsel for Respondents The Legislature of the State of Nevada, The Senate of the State of Nevada, Hon. Lorraine T. Hunt, The Assembly of the State of Nevada, Hon. Richard D. Perkins, Jacqueline Sneddon, Diane Keetch, Brenda Erdoes, and Claire J. Clift

Dated: December 14, 2004.